In the

Supreme Court of the United States

October Term, 1951

Nos. 186 and 187

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner,

vs.

ROANE-ANDERSON COMPANY, ET AL.
Respondents

and

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner,

vs.

CARBIDE AND CARBON CHEMICAL CORPORATION, ET AL.
Respondents

BRIEF OF THE STATE OF GEORGIA AMICUS CURIAE

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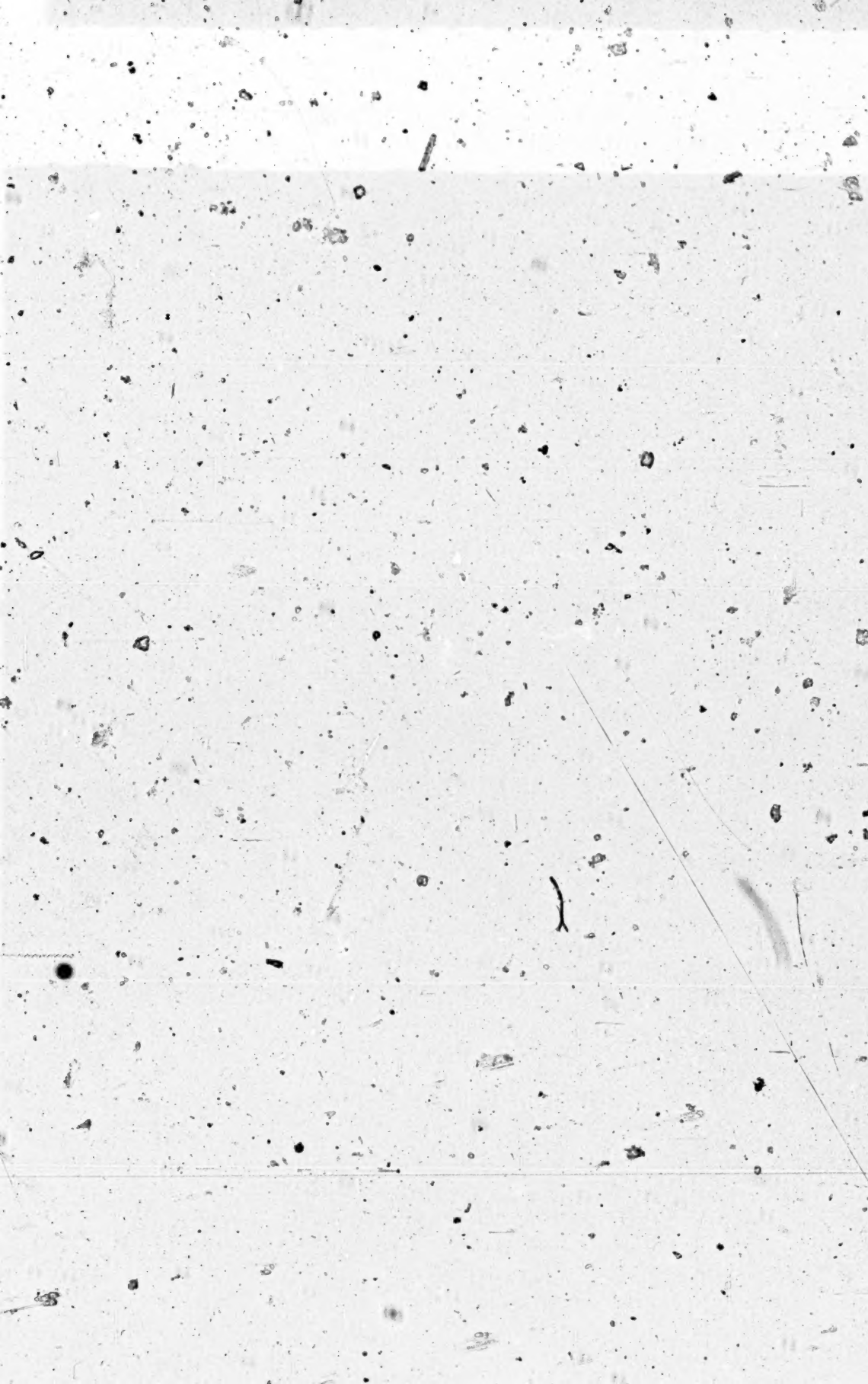

INDEX

CASES CITED

STATUTES CITED

TEXTBOOK CITED

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

The State of Georgia by its Attorney General and pursuant to Rule 27-9(d) of this Court, files this brief in support of a petition for the writ of certiorari to the Supreme Court of the State of Tennessee, filed in this Court by Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee.

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

These cases were consolidated for trial in the Chan-

cery Court for Davidson County, Nashville, Tennessee, and but one opinion was rendered disposing of the consolidated cases (No. 186R.50, No. 187R.47). This opinion is not reported. Three opinions were filed by the Supreme Court of Tennessee: a majority opinion (No. 186R.7; No. 187R.5) a concurring opinion (No. 186R.24; No. 187R.23) and a dissenting opinion (No. 186R.26; No. 187R.25), the latter being filed by two of the five Justices who comprise that court. These opinions are reported in 239 S.W. (2d) 27.

STATEMENT OF JURISDICTION

The State of Georgia adopts the statement of jurisdiction as made in the brief for petitioner.

In addition, the State of Georgia respectfully insists that the Supreme Court of Tennessee has held that but for the language of Section 9(b) of the Atomic Energy Act of 1946, the independent contractor respondents are liable for the taxes imposed by the Tennessee Sales and Use Tax Act and that the Supreme Court of Tennessee has improperly interpreted said Section 9(b) of the Atomic Energy Act of 1946. Therefore, by resting its decision squarely upon this interpretation of a Federal statute, a Federal question of substance has been raised not heretofore decided by this Court. *Reconstruction Finance Corporation v. County of Beaver, Pennsylvania*, 328 U. S. 204, 208.

The question presented is of much national interest and should be inquired into by this Honorable Court. A determination by this Court will avoid confusion in many jurisdictions and the resulting decisions necessary which may well be the reverse of the Tennessee decision of which the State of Georgia here complains.

INTEREST OF THE AMICUS CURIAE

1. The General Assembly of the State of Georgia enacted a "Retailers' and Consumers' Sales and Use Tax Act," Georgia Laws, 1951, page 360, substantially the same as the act which imposes the taxes here involved except that the Tennessee Act levies the sales tax upon the vendor and the Georgia Act levies the sales tax upon the consumer. The difference is not thought to be material to the issues here as to the respondents Roane-Anderson Company and Carbide and Carbon Chemical Corporation.

2. The Atomic Energy Commission is in the process of constructing a huge installation in the vicinity of Ellington, South Carolina, popularly known as the Savannah River Project. The Operations Office for this project was located in Augusta, Georgia.

3. The Atomic Energy Commission has entered into a cost-plus-fixed-fee contract with E. I. duPont de Nemours and Company which authorizes an initial expenditure of one hundred million dollars ($100,000,000.00). Some of this sum will be spent in the State of Georgia by this independent contractor and a proper interpretation of Section 9(b) of the Atomic Energy Act of 1946 will determine, in large part, the taxability of purchases made in Georgia by the duPont Company.

STATEMENT OF THE CASE

The State of Georgia adopts the statement of the case as made in the brief for petitioner.

ISSUES INVOLVED

The questions presented by the petitioner together

with petitioner's reasons for granting the writ of ce
tiorari may be summarized as follows:

1. Does Section 9(b) of the Atomic Energy A
of 1946, 42 U.S.C.A., 1951 Supplement, Sectio
1809(b), exempt from State sales and use taxatio
the purchase and use of tangible personal propert
by independent contractors of the Atomic Energ
Commission as "activities" of the Commission itsel

ARGUMENT AND CITATION OF AUTHORIT

**1. Respondents are independent contractors an
therefore the doctrine of implied constitutional immu
ity is not applicable.**

The Courts of the State of Tennessee upon a stud
of the contracts of the respondents, Roane-Anderso
Company and Carbide and Carbon Chemical Corpora
tion, and a finding of facts, determined that sai
respondents were independent contractors. (No. 18
R.16; No. 187R.14,15) The State of Georgia consi
ers binding this application of State law to the fac
in both the majority opinion complained of and th
dissent (No. 186R.26; No. 187R.25) in respect t
this question. *Reconstruction Finance Corporation
County of Beaver, Pennsylvania*, 328 U. S. 204, 20

Since the respondents are independent contractor
the doctrine of implied constitutional immunity is no
applicable. *James v. Dravo Contracting Company*
302 U. S. 134, *State of Alabama v. King and Booze*
314 U. S. 1, and *Curry v. United States*, 314 U. S. 1

In *State of Alabama v. King and Boozer*, supra, th
Court said:

> "*They were not relieved* of the liability to pa
> the tax either *because the contractors in a loo*

and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors." (Emphasis supplied.)

This Court has also said:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond *the national government itself* and governmental functions performed by *its officers and agents.* We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, . . ." (Emphasis supplied.) *Penn Dairies v. Milk Control Commission of the Commonwealth of Pennsylvania,* 318 U. S. 261, 270, 271.

2. Any tax exemption claimed or enjoyed by respondents must stem from express Congressional grant.

The State of Georgia believes that the majority opinion rendered by the Supreme Court of Tennessee properly states the question to be determined as: "Did the Congress of the United States enact appropriate legislation to immunize the [independent] contractors involved in the instant case?" (No. 186R.18,

19; No. 187R.17) That it is possible for the Congress to enact such legislation is not here questioned.

In *Alabama v. King and Boozer*, supra, this Court said:

> "Congress has declined to pass legislation immunizing from State taxation, contractors under 'cost-plus' contracts for the construction of governmental projects."

The Congress has considered such tax immunizing legislation and has refused to enact it. Citation in Footnote 1, *Alabama v. King and Boozer*, supra.

The will of the Legislature is to be discovered as well by what the Legislature has not declared as by what they have expressed. *Houston v. Moore*, 5 Wheat. 1, 21. It is urged that since Congress can supply the proper words if such is its intention, the fact that they are not supplied leaves only the conclusion that such was not intended.

In speaking of what is to be gained by inferences from silence or lack of express terms in a statute, this Court in *Bates v. Brown*, 5 Wall. 710, 718, said:

> "If the legislature had designed to provide for this case, according to the rule insisted upon, we cannot doubt that they would have said so in express terms. The statute bears no marks of haste or inattention. We cannot believe it was intended to leave a rule of the common law so well known, and so important, to be deduced and established only by the doubtful results of discussion and inference. The draughtsman of the bill could not have overlooked it, and the silence of the statute is full of meaning."

This Court has also enunciated the principle that

the silence of Congress when it has authority to speak may sometimes give rise to an implication as to the Congressional purpose; and the nature and extent of that implication depends upon the nature of the Congressional power and the effect of its exercise. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466. It is earnestly contended that the Congress having the power to immunize these independent contractors and not doing so in clear and unequivocal language indicates beyond question that it has not chosen to do so.

It is a well understood principle of construction that in the absence of a definition of a statutory word by the Legislature, the etymology of the word must be considered and its ordinary meaning applied. *United States v. Lombardo*, 241 U. S. 73, 76. We know of no common or legal definition of "activities" such as the connotation or meaning given the word by the effect of the ruling of the Supreme Court of Tennessee.

In *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 342, 366, this Court said:

> "But Congress has not created an immunity here by affirmative action, and 'The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.' Oklahoma Tax Commission v. United States, 319 U. S. 598, 604, . . . '. . . if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.' "

We respectfully call to the Court's attention to two old and time-honored maxims that taxation is the rule and exemption the exception and tax exemptions must be strictly construed. *Smith v. Davis*, 323 U. S. 11,

117, *The Yazoo and Mississippi Valley Railroad Company v. Thomas*, 132 U. S. 174, 185.

In order to keep the question which is before the Court more clearly in focus, it is respectfully submitted that the question here does not involve a cession by the State of Tennessee of its taxing jurisdiction, either through delegated powers in the Constitution of the United States, *Graves v. New York, ex rel. O'Keefe*, supra; *United States v. County of Allegheny*, 322 U. S. 174, or by special grant of the State of Tennessee to the Federal Government, nor by a withholding of taxing jurisdiction by an Act of Congress, *Federal Land Bank v. Crosland*, 271 U. S. 374; *Pittman v. Home Owners Loan Corporation*, 308 U. S. 21; *Federal Land Bank v. Bismark Lumber Company*, 314 U. S. 95.

As will be shown below, the incidence of taxation is outside that ceded by the State of Tennessee to the Federal Government, either through the delegated powers of the Constitution of the United States, *Oklahoma Tax Commission v. Texas Company*, supra, or by special grant of the State of Tennessee to the Federal Government, *Wilson v. Cook*, 327 U. S. 474; *S. R. A., Inc., v. Minnesota*, 327 U. S. 558, nor has the incidence of taxation been withheld by an Act of Congress, *Reconstruction Finance Corporation v. County of Beaver, Pennsylvania*, supra.

3. Does Section 9(b) of the Atomic Energy Act of 1946 exempt from State sales and use taxation the purchase and use of tangible personal property by independent contractors of the Atomic Energy Commission?

Section 9(b) of the Atomic Energy Act of 1946 provides:

"(b) In order to render financial assistance

to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been case upon the State or local government by activities of the Commission, the Manhattan Engineer District of their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof. Aug 1, 1946, c. 724, Sec. 9, 60 Stat. 765."

As pointed out by the Supreme Court of Tennessee in the majority opinion:

"Obviously, the question presented is whether the purchase and use of materials and supplies by cost type contractors of the Atomic Energy Commission in the performance of their contracts are part of the 'activities—of the Commission' within the intendment of the provision just quoted and are thereby exempted from taxation by any state, county or subdivision thereof 'in any man-

ner or form.'" (No. 186R.19; No. 187R.18)

The State of Georgia believes the Supreme Court of Tennessee correctly states that the word "activities" has a broad meaning "because the term within itself would cover anything *that the Commission was undertaking to do.*" (No. 186R.20; No. 187R.19). (Emphasis supplied.) But the conclusion of the Court is not consistent with this language, for the contractor's acts are not the acts of the Commission.

(a) A statute which is clear and unambiguous is not open to construction or interpretation.

When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to statute interpretation.

In *Lake County v. Rollins*, 130 U. S. 662, 670, Mr. Justice Lamar expressed this principle of construction with force and clarity as follows:

> "To get at the thought and meaning in a statute, a contract or a constitution, the first resort in all cases is to the natural significance of the words, and the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then the meaning apparent on the face of the instrument must be accepted and neither the courts nor the legislature have a right to add to it or take from it."

It has long been an established rule that a plain and unambiguous statute is to be applied and not interpreted, since such a statute speaks for itself, and

any attempt to make it clearer is a vain labor and tends only to obscurity, 50 Am. Jur. Statutes, Section 225.

(b) "Activities" of the Atomic Energy Commission are to produce or provide for the production of atomic energy.

A review of the Atomic Energy Act of 1946 indicates that the purpose for which the Commission was created and the activities in which it is authorized to engage are activities for the research and development of atomic energy, to assist private or public agencies in the research or development of atomic energy, to provide for the ownership by the Atomic Energy Commission of all facilities and materials needed in the proper conduct of its authorized activities, to control the production of fissionable material, to regulate the distribution of fissionable material and the uses to which they may be put, and general regulatory functions necessary to the proper operation of such a commission which has been given a complete governmental monopoly in the field of research and production of atomic energy.

Section 12 of the Atomic Energy Act sums up, clarifies and enumerates the authority, powers and duties of the Commission in general in its overall activities of maintaining advisory boards, promulgating rules and regulations, and functioning in the field of research and production.

More specifically, however, Section 4(c)(2) of the Atomic Energy Act pertains to the "activities" of the Atomic Energy Commission in the field of research and production.

Section 4(c)(2) shows us only two activities authorized by Congress for the Atomic Energy Commission:

(1) "The Commission is authorized and directed to produce . . . fissionable materials in its own facilities."

(2) "The Commission is authorized and directed . . . to provide for the production of fissionable material in its own facilities."

In connection with the provision for production by the Atomic Energy Commission, Section 4(c)(2) goes on to state what the Commission's activities in this field shall be:

(1) ". . . *the Commission is authorized to make, or continue in effect, contracts* with persons obligating them to produce fissionable material . . ." (Emphasis supplied.)

(2) "*The Commission is also authorized to enter into* research and development *contracts* . . ." (Emphasis supplied.)

(c) "Activities" of the Atomic Energy Commission within the purview of Section 9(b) do not include "activities" of independent contractors in the performance of their contracts.

Nowhere in Section 9(b) of the Atomic Energy Act can a specific reference to independent contractors be found. This Court's attention is once more respectfully called to the fact that the only immunity from State taxation provided in Section 9(b) is for:

(1) "The Commission

(2) "and the . . . , activities, . . . of the Commission . . ."

As for "activities," the only activities provided for are "activities of the Commission," "Manhattan Engineer District," and "or their agents."

It seems clear that only the activities "of the Commission" were intended to be exempt or are exempt from State taxation by the authority vested in Congress and provided in the Atomic Energy Act. Independent contractors were not intended to be exempt since *nowhere* in the Atomic Energy Act are activities of independent contractors mentioned as an "activity" of the Atomic Energy Commission.

In *United States vs. Silk*, 331 U. S. 704, 712, this Court said:

> "Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees."

It follows, therefore, that his activity in the manual building would not be the activity of the industry with whom he contracted. The State of Georgia respectfully contends that the activity of the Atomic Energy Commission in this case did not go beyond the act of entering into a contract with the respondents. The performance of the contract by the respondents is their own activity. The very concept of the acts of an independent contractor being the acts of or activity of the Atomic Energy Commission is contradictory. Within the scope of his agency, an agent's activity is the activity of his principal but an independent contractor's activity is his own activity limited only by the proper completion of an objective. In other words, the independent contractor's acts are *acts for* and not *acts of* the other contracting party.

The argument that the use of the word "activities" by the Congress is meaningless except as interpreted by the majority in the Supreme Court of Tennessee is without merit. We view the use of the word as restric-

tive rather than expansive. Congress has refused to exempt the activities of independent contractors in the past and it is urged that this is but another statement to the same effect.

It is conceded that the income *of the Atomic Energy Commission*, the property of *the Atomic Energy Commission* and the activities *of the Atomic Energy Commission* would be exempt under the doctrine of implied constitutional immunity without the necessity of statutory language and it is respectfully urged that the listing of income, property and activities of the Atomic Energy Commission is clearly indicative of restriction. These exemptions are already enjoyed. The Congress in listing them is merely making it clear beyond peradventure that the exemption is not to be extended to others who may engage in activities of their own in the performance of contracts with the Atomic Energy Commission.

The State of Georgia respectfully submits that the Supreme Court of Tennessee has incorrectly, unnecessarily and loosely interpreted Section 9(b) of the Atomic Energy Act of 1946 and adds its request that the writ of certiorari be granted.

Respectfully submitted,

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